

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 24, 2009

JENNY PENTECOST (DECKARD) v. BRADY PENTECOST, SR.

Appeal from the Circuit Court for Sumner County
No. 26555-C C.L. Rogers, Judge

No. M2008-02717-COA-R3-CV - Filed December 1, 2009

Mother challenges the trial court's denial of her petition to make her the primary residential parent despite the court's finding that there had been a material change of circumstances. We affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Fletcher W. Long, Springfield, Tennessee, for the appellant, Jenny Pentecost.

Rosemary E. Phillips, Goodlettsville, Tennessee, for the appellee, Brady Pentecost, Sr.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Jenny Pentecost ("Mother") and Brady Pentecost ("Father") were divorced on grounds of irreconcilable differences on October 11, 2005. Pursuant to the permanent parenting plan, Mother was named the primary residential parent of the parties' two minor children. From November 1, 2005, through April 6, 2006, the children were in the care of Father while Mother completed basic training for the military.¹ When Mother returned from basic training, she and the children went to Florida for two weeks. Mother then returned the children to Father's care for the remainder of the school year.

In May 2006, Father filed a petition objecting to Mother's proposed relocation to Georgia or, in the alternative, to modify the final divorce decree to make him the primary residential parent. The court issued a temporary restraining order prohibiting Mother from removing the children from

¹ Mother subsequently left the military.

Father's primary care or from taking them out of Sumner County or the surrounding counties during her parenting time. In June 2006, the court entered an order incorporating a new agreed parenting plan stating that Father would be the primary residential parent during the school year and Mother would be the primary residential parent during the summer.² The court ordered Mother to pay child support. At the time this order was entered, Mother was planning to relocate to Oklahoma. However, she ended up staying in Oklahoma for only one week before returning to Tennessee.

In October 2006, Mother filed a petition to modify the permanent parenting plan to make her the primary residential parent. As grounds for her petition, Mother stated that she had returned to Tennessee, the children were spending most of their time with the paternal grandmother instead of with Father, and that Father abused alcohol and did not provide a stable living environment. Father answered and counterclaimed alleging that Mother was in contempt for failure to pay child support.

Mother amended her petition in January 2008 to include allegations concerning two incidents that resulted in Father's arrest for domestic assault. After the second incident, in January 2008, Mother took the children to live with her and refused to return them to Father's home. Mother again stated that Father abused alcohol and alleged that his home was an unsafe environment for the children. She renewed her request to be made the primary residential parent. Father had entered a rehabilitation facility when Mother filed her petition. In his answer to Mother's petition, Father admitted that he had pled guilty or been convicted of domestic assault with regard to the first incident but stated that all charges had been dismissed with respect to the second incident. Father admitted drinking alcohol but denied abusing alcohol on a regular basis.

In July 2008, Mother filed a motion for a temporary residential schedule stating that the children had been in her care, not Father's care, since January 24, 2008. After a hearing in August 2008 on Mother's motion for temporary custody, the court concluded that it was appropriate to continue following the May 2006 parenting plan under which Father was the primary residential parent. Mother was therefore ordered to return the children to Father. The court awarded Mother parenting time every other weekend.

HEARING AND TRIAL COURT DECISION

Mother's petition to modify the parenting plan was tried on October 27, 2008. The court heard testimony from a police officer who responded to a domestic call at Father's home in August 2008 due to an altercation between Father and Mother's new husband, Gavin Deckard.³ Mr. Deckard was charged with simple assault, but the case was still open at the time of the trial. A court-appointed special advocate (CASA) volunteer appointed to advocate for the best interest of the

²Under this plan, Mother spent 99 days and Father spend 266 days per year with the children. Thus, Father was the primary residential parent.

³Mr. Deckard was a police officer in another town.

children testified and submitted a report to the court. The CASA volunteer expressed concern over the older child's "familiarity with adult issues regarding this case."

Father admitted being arrested for DUI in February 2008 and acknowledged that he was an alcoholic. He stated that he was following through with treatment with Alcoholics Anonymous; he also admitted that he had consumed alcohol "a couple of times" since his inpatient rehab but not around the children. Father had remarried in September 2008, and his new wife had a nine-year-old child who lived with them. The paternal grandmother picked the Pentecost children up from school and took them to her house for the rest of the afternoon. Father also testified about Mother's numerous moves, her failure to see the children regularly until the summer of 2007, and her failure to pay child support as ordered. Father expressed doubt that Mother would promote his relationship with the children if she had primary custody because she tended to be controlling. He testified that he allowed Mother to see the children as ordered even when she failed to bring them back when it was his time. Father stated that Mother had called excessively when the children were with him and upset the children. Father opined that the children were happy living with him.

Mother testified that she and her new husband, Mr. Deckard, married in January 2008 and had a nine-month-old child. Mr. Deckard also had three other children from three previous relationships. Mother stated that, when the Pentecost children came to her house, there were usually at least five children there. Mother admitted that she had moved around a lot, lived with a lot of people, and had not been financially stable. She testified that she had been stable "for a while." Mother acknowledged that Father had abused alcohol when she had been married to him. She took the children to live with her in January 2008 after Father's second domestic incident because she did not want them to be in that kind of environment. Mother estimated that she owed \$10,000 in back child support. She testified that she wanted the children to live with her because she did not have problems with alcohol abuse or domestic violence and took the children to church. She admitted praying over the telephone with the older child that he could "come back home" because that was what the child wanted.

The court also heard testimony from Mr. Deckard, Mother's new husband, who described the altercation he had with Father that led to his being charged with simple assault. Father's new wife, Heather Pentecost, testified that since she started dating Father in April 2008, Father probably drank about once a month.

On November 6, 2008, the court entered a thorough order concluding that Father would remain the primary residential parent. The court further ordered Mother to pay child support in the amount of \$339.00 per month, found her to be in contempt for failure to pay child support, and awarded judgment to Father for back child support and interest in the amount of \$19,578.02.

STANDARD OF REVIEW

Our review of the trial court's findings of fact is de novo with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Kendrick v.*

Shoemake, 90 S.W.3d 566, 570 (Tenn. 2002); *Marlow v. Parkinson*, 236 S.W.3d 744, 748 (Tenn. Ct. App. 2007). When the trial court makes no specific findings of fact, however, we must review the record to determine where the preponderance of the evidence lies. *Kendrick*, 90 S.W.3d at 570. Determinations regarding custody and visitation “often hinge on subtle factors, including the parents’ demeanor and credibility during the divorce proceedings themselves.” *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). We “give great weight to the trial court’s assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses.” *Boyer v. Heimermann*, 238 S.W.3d 249, 255 (Tenn. Ct. App. 2007).

ANALYSIS

On appeal, Mother argues that the evidence does not support the trial court’s factual findings and that the trial court erred in declining to change the primary residential parent to Mother based upon the best interest of the children.

It is well-established that, in order to modify a parenting plan to change the primary residential parent, the trial court must apply a two-part analysis: the court must find that “both a material change of circumstances has occurred and a change of custody is in the child’s best interests.” *Kendrick*, 90 S.W.3d at 575. Tenn. Code Ann. § 36-6-101(a)(2)(B) is the relevant statutory provision as to what constitutes a material change of circumstance in the context of a custody change:

If the issue before the court is a modification of the court’s prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

As noted by the court in *Kendrick*, “[t]here are no hard and fast rules for determining when a child’s circumstances have changed sufficiently to warrant a change of his or her custody.” *Kendrick*, 90 S.W.3d at 570 (quoting *Blair v. Bandenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)). Several factors to consider when making this determination are whether the change occurred after the entry of the order to be modified, whether the asserted change was known or reasonably anticipated at the time of the original order’s entry, and whether the change “affects the child’s well-being in a meaningful way.” *Id.* (quoting *Blair*, 77 S.W.3d at 150).

The trial court’s order contains the following statements related to its consideration of whether a material change of circumstance had occurred:

There has been a material change of circumstance to the extent that a lot has gone on with the father having a DUI and two (2) domestic assault charges. The

mother has also had lots of problems since June 2006 when the parties entered into an Agreed Order placing custody with the father.

In August 2008, the Court placed the children with the father who had legal custody since June of 2006 to see how the parties would react. Since that time, the mother has not promoted the children's relationship with the father. She has shown poor judgement [sic] in keeping the children on the father's weekend and talking to the children about this case.

The Court, having found a material change of circumstance, must determine if that change was an unanticipated significant change of circumstance which supports a change of custody. That unanticipated significant change must affect the children in a material way. If that threshold is passed, the Court must then conduct a comparative fitness test to decide which parent's home is the most beneficial for the children and, in this case, whether that test overcomes the issues of continuity with the father.

After this introduction, the trial court proceeded to summarize the pertinent history and facts of the case. The court then concluded that custody should remain with Father:

While there has been a material change of circumstance, the circumstance was not unanticipated, based on the mother's testimony that the father drank too much before the last Order of the Court and knowing that, the mother agreed to his being the primary custodian. Secondly, the change has not affected the children in a material way as their report cards show that they are both doing well. There was no testimony that either child is anything but happy as things are. Even if the Court went on to address the comparative fitness test, custody would remain with the father.

Based upon this analysis, it appears that the trial court essentially found that, while there had been a change of circumstances, the change was not a material change of circumstances because it was anticipated at the time of the June 2006 order and had not affected the children's wellbeing. *See Kendrick*, 90 S.W.3d at 570. Arguably, then, there was no material change of circumstances. The court went on, however, to address the best interest determination.

As this court has previously noted, "a finding that a material change of circumstances has occurred does not predetermine the outcome of the best interest analysis and does not require that a change in custody or visitation be made." *Scoggins v. Scoggins*, No. M2007-02148-COA-R3-CV, 2008 WL 2648966, at *5 (Tenn. Ct. App. July 2, 2008); *see also Boyer*, 238 S.W.3d at 259. In making its best interest determination, the court is to consider the factors set forth at Tenn. Code Ann. § 36-6-106(a):

(1) The love, affection and emotional ties existing between the parents or caregivers and the child;

- (2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment . . . ;
- (4) The stability of the family unit of the parents or caregivers;
- (5) The mental and physical health of the parents or caregivers;
- (6) The home, school and community record of the child;
- (7) The reasonable preference of the child . . . ;
- (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person . . . ;
- (9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child; and
- (10) Each parent or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child.

In this case, the trial court undertook a detailed analysis of the factors of Tenn. Code Ann. § 36-1-106(a). Mother objects to the weight given by the trial court to various facts in the record. It should be noted at the outset that, while a trial court must consider all of the statutory factors, it is not required to specify the effect of each factor on the overall determination. *Dillard v. Dillard*, No. M2007-00215-COA-R3-CV, 2008 WL 2229523, at *5 (Tenn. Ct. App. May 29, 2008). Mother asserts that factor (3), continuity of placement, should have been found to favor Mother instead of Father in light of the children's placement with Mother during the period from January through August of 2008. The court stated that Father "provided a stable, satisfactory environment except for a short time the first of 2008." While Mother is correct in her assertion that the children were with her for more than a short time during 2008, the court appears to have looked at the overall picture showing that the children had lived with Father for the majority of the relevant time period and that he acquiesced to their staying with Mother during a period of personal crisis.

Mother's argument with respect to factor (4), stability of the family unit, again focuses on the period during 2008 when the children were in her care; she emphasizes that she took the children to the paternal grandmother's house regularly during that time. In finding factor (4) to favor Father,

the court noted that Father had family support from his new wife and her parents and extended family as well as from his mother and stepfather. We cannot say that the evidence preponderates against the trial court's finding that factor (4) weighed in favor of Father. With regard to factor (5), the health of the parents, Mother argues that the court erred in failing to find that this factor favored her, asserting that Father's alcohol issues "were allowed to escape the scrutiny of the Court." The court did not specifically find factor (5) to favor either parent but did expressly note Father's "issue with alcohol." Elsewhere in its opinion, the court emphasized Mother's admission that Father had used alcohol to excess during their marriage and noted that there was no evidence of any detrimental impact on the children. As to factor (6), the children's home, school and community record, the court found this factor to favor Father, noting that he had "been responsible for the children having a place to live, getting them to school and school activities and having them be a part of the community." Mother again emphasizes her care for the children during part of 2008. She also points out that Father's driver's license was restricted after his DUI. We cannot say that the evidence preponderates against the trial court's weighing of this factor. The court looked at the entire period since the June 2006 order and saw Father as the more stable and consistent influence in the lives of the children.

Factor (8) pertains to physical or emotional abuse. With respect to this factor, the court stated that "the mother's coaching the son and her discussing this case with the children is certainly a form of emotional abuse." The court also cited the evidence of "the mother's husband being violent since he [attacked] the father, injured him and is facing assault charges." While noting Father's guilty plea to domestic assault against his former girlfriend, the court found factor (8) to favor Father. Mother admits that she prayed with her son regarding the outcome of the custody dispute, but she argues that "the evidence does not prove that the mother 'coached' the children." The testimony and report of the CASA volunteer, however, do contain evidence that the oldest child had been coached with respect to some questions. Mother denied putting any pressure on the children. The trial court was in the best position to assess the credibility of the various witnesses. Mother also argues that "father's domestic assault charges and DUI along with his admittance . . . that he continued to consume alcohol escaped the scrutiny of the Court and had no bearing on the Court's determination of the best interests of the children." We respectfully disagree. The court expressly noted Father's domestic assault charges in its analysis of factor (8). Elsewhere in its order, the court addressed Father's DUI and alcohol use. In deciding that factor (8) favored Father, the trial court focused upon the effects of each party's behavior upon the children and concluded that Mother had subjected them to a form of emotional abuse.

Factor (9), the character and behavior of other persons frequenting the parents' homes, was found to favor Father based upon evidence of the loving relationship between the children and Father's new wife and Father's mother and stepfather, as well as the children's positive interactions with their stepbrother. Mother argues that nothing in the record shows any detrimental influence from persons in her house. She also takes issue with the court's reference to her new husband being charged with simple assault on the basis that the charges were still pending at the time of the hearing. The court only referenced charges, not a conviction, so we see no misstatement in the court's opinion. The trial court also noted that there were usually five children at Mother's home when her

new husband's children came to visit. The evidence does not preponderate against the trial court's determination under factor (9).

Although the trial court did not specifically cite factor (10), potential for future performance of parenting responsibilities, the factor also favors Father in light of the trial court's express finding that Mother had not promoted the children's relationship with Father.

Mother's overall argument is that the court failed to give appropriate weight and consideration to Father's alcohol abuse and her care of the children during 2008. She asserts that, while she made some bad decisions in the past, she has "become the more stable and fit parent to be designated primary residential parent." Looking at all of the evidence and the trial court's order, however, we do not think that the evidence preponderates against the trial court's determination that it was in the children's best interest for Father to remain the primary residential parent.

CONCLUSION

We affirm the trial court's decision. Costs of appeal are assessed against Mother, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE